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STATE OF MICHIGAN
IN THE SUPREME COURT

WYANDOTTE ELECTRIC SUPPLY CO.,

Plaintiff/Appellee,

v

ELECTRICAL TECHNOLOGY SYSTEMS, INC.,

Defendant/Cross-Defendant,

and

KEO & ASSOCIATES, INC. and **WESTFIELD INSURANCE COMPANY**,

Defendants/Appellants.

Supreme Court No. 149989
Court of Appeals No. 313736
Wayne County Circuit Court
Case No. 11-003015-CK

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APPELLANTS' BRIEF ON APPEAL

*****ORAL ARGUMENT REQUESTED*****

RECEIVED by MSC 3/31/2015 3:29:34 PM

TABLE OF CONTENTS

RECEIVED by MSC 3/31/2015 3:29:34 PM

INDEX OF AUTHORITIES

Michigan Supreme Court Cases — **Page**

RECEIVED by MSC 3/31/2015 3:29:34 PM

Michigan Court of Appeals Cases

RECEIVED by MSC 3/31/2015 3:29:34 PM

Unpublished Cases

RECEIVED by MSC 3/31/2015 3:29:34 PM

State Statutes

Rules

RECEIVED by MSC 3/31/2015 3:29:34 PM

United States Supreme Court Cases

Federal District Court Cases

Federal Statutes

Other Sources

RECEIVED by MSC 3/31/2015 3:29:34 PM

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. Whether the Court of Appeals erred in holding that a bond claimant complied with MCL § 129.207 where it did not and could not prove actual receipt of written notice by the principal contractor or strict compliance with the bond act's notice requirements.

KEO / Westfield:	Yes
Wyandotte:	No
Court of Appeals	No

II. Whether the Court of Appeals erred in holding the principal and surety liable to to pay attorney fees and finance charges as sums "justly due" where the bond act does not provide for attorney fees and the principal never agreed to pay those charges.

KEO / Westfield	Yes
Wyandotte:	No
Court of Appeals	No

III. Whether the Court of Appeals erred in applying MCL § 600.6018(7) to the money judgment and finding that a written instrument evidencing indebtedness with a specified rate of interest existed in this case.

KEO / Westfield	Yes
Wyandotte:	No
Court of Appeals	No

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STATEMENT OF JURISDICTION

This Court granted leave to appeal on February 4, 2015. This Court has jurisdiction pursuant to MCR 7.301(A)(2).

RECEIVED by MSC 3/31/2015 3:29:34 PM

STATEMENT OF FACTS

Plaintiff/Appellee Wyandotte Electric Supply Co. ("Wyandotte") is an electrical material supplier that sold goods to Electrical Technology Systems, Inc. ("ETS") on account. ETS was at the time an electrical subcontractor. Wyandotte sold its materials to ETS pursuant to a credit application from 2003.[1] Under their agreement, ETS agreed to pay "finance charges" of 18% per annum to Wyandotte for the cost of goods sold but not timely paid by ETS. The credit agreement also required ETS to pay a portion of Wyandotte's attorney fees upon Wyandotte filing suit to collect unpaid balances due from ETS.

Defendant/Appellant KEO & Associates, Inc. ("KEO") is in the business of construction general contracting. It was the general contractor for the renovation of the South Wing of the Detroit Public Library (the "Project") in 2009. At that time in connection with the Project, KEO obtained the necessary statutory payment bond supplied by Defendant/Appellant Westfield Insurance Company ("Westfield") to comply Michigan's Public Works Act, MCL 129.201, et seq. (the "Act").[2] The bond identifies Westfield as surety and KEO as principal.

In furtherance of its role as principal contractor on the Project, KEO engaged ETS as its electrical subcontractor.[3] The subcontract between them includes an industry custom "Pay-If-Paid" clause at Section 5.5 that required KEO to receive payment from the owner as a condition precedent to its obligation to pay ETS. The subcontract also

[1] App 10a.
[2] App 52a.
[3] App 21a; App 210a, ¶ B.

RECEIVED by MSC 3/31/2015 3:29:34 PM

includes an "integration" clause at Section 2.9. KEO did not agree to pay finance charges or attorney fees to ETS under their subcontract agreement.

ETS obtained a quotation from Wyandotte to supply electrical materials to ETS for use on the Project,[4] and ultimately ETS issued a purchase order to Wyandotte on February 19, 2010 to buy the materials.[5] Wyandotte furnished electrical material to ETS for use on the Project from March 3, 2010 until January 10, 2011.[6]

On March 3, 2010, Wyandotte sent certified mail letters to KEO and Wyandotte to request a copy of the statutory bond on the Project.[7] The March 3, 2010 letters reference the Michigan Construction Lien Act, MCL § 570.1101, et seq. ("Lien Act"). Wyandotte requested copies any notice of commencement in connection with the Lien Act.[8] The letter does not say that Wyandotte would be supplying materials to ETS on the Project. Wyandotte subsequently obtained a copy of the bond.

On March 10, 2010, Wyandotte attempted to serve its initial thirty day notice upon KEO pursuant to the Act.[9] Wyandotte knew as of March 23, 2010 that its notice was received by the Owner, Westfield, and ETS.[10] It also knew that its thirty day notice was *not* served upon KEO. Its certified mail track and confirm report did not show that KEO received the notice.[11] Wyandotte has conceded that its thirty day notice was not served upon KEO. During the investigation into the legitimacy of Wyandotte's claim for payment, Wyandotte's credit manager wrote to Westfield:

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[4] App 12a.
[5] App 15a.
[6] App 210a, ¶ D.
[7] App 16a.
[8] As will be further addressed below, the Lien Act applies to private improvements only.
[9] App 17a.
[10] App 58a, 59a, 60a.
[11] App 57a.

RECEIVED by MSC 3/31/2015 3:29:34 PM

> With respect to your inquiry regarding the timeliness of our Notice of Furnishing, kindly find enclosed herewith the records received from the [USPS] for that item, which does indeed indicate that the item was not delivered. Nevertheless, we would refer you to MCL 570.1109, which provides that proper notice is effectuated upon deposit with the USPS.[12]

Wyandotte conceded its thirty day notice was not delivered or received by KEO, and possessed post office records to confirm that fact. Wyandotte further conceded that "no proof" existed that its thirty day notice was served on KEO for purposes of the litigation.[13]

ETS failed to perform on the project, KEO terminated the subcontract and obtained a default judgment in this case.[14] Without having received Wyandotte's thirty day notice, KEO made progress payments of more than $248,000 to ETS for the electrical labor and materials provided.[15] KEO did not know that ETS was not paying for the materials supplied by Wyandotte.[16]

In June 2010, Wyandotte ceased extending credit on the sales and placed Wyandotte for cash on delivery for the remaining materials supplied.[17] The last "on-credit" shipment of materials by Wyandotte to ETS for the Project occurred on July 22, 2010. Wyandotte's credit agreement with ETS allowed Wyandotte to switch its payment terms to C.O.D. because the account was past due 30 days of payment.[18] Wyandotte did not release another shipment to the Project until September 7, 2010 when

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[12] App 162a.
[13] App 113a-114a, fn1.
[14] App 106a.
[15] App 220a.
[16] App 211a, ¶¶ E, F, G.
[17] App 211a, ¶ L.
[18] App 211a, ¶ L.

RECEIVED by MSC 3/31/2015 3:29:34 PM

Wyandotte received payment in advance for the materials. KEO directly paid Wyandotte $2,000.00 in a check dated November 1, 2010.[19] Wyandotte admits that it received payment for its last deliveries to the Project.[20] The last unpaid material shipment of Wyandotte occurred on July 22, 2010 and its last delivery was September 30, 2010.

On November 1, 2010, Wyandotte notified KEO and Westfield that it was owed $150,762.33 for electrical materials furnished to ETS and that amount included time-price differential charges of 1.5% per month.[21] Wyandotte's ninety day notice states that, "The last date of furnishing electrical materials was September 30, 2010." Wyandotte later provided a "Proof of Claim" which re-stated that its last date of furnishing materials was September 30, 2010.[22]

After KEO received Wyandotte's notice, KEO requested information from ETS confirming payments in the form of a sworn statement. ETS provided a sworn statement dated "as of November 22, 2010," showing that ETS had paid Wyandotte $80,000.00[23] which proved to be false. Westfield investigated and denied liability to Wyandotte under the bond act.

Wyandotte filed its complaint against KEO, Westfield and ETS on March 14, 2011.[24] On or about March 29, 2011, KEO and Westfield filed their answers, in which

[19] App 211a, ¶ L.
[20] App 211-212a, ¶¶ P, Q, R, S
[21] App 18a; App 211a, ¶ M.
[22] App 45a; App 211a, ¶ O.
[23] App 19a.
[24] App 46a.

RECEIVED by MSC 3/31/2015 3:29:34 PM

KEO and Westfield both pled the affirmative defense that Wyandotte failed to comply with the statutory notice provisions of the Act.[25]

KEO filed its cross-claim against ETS.[26] ETS failed to answer Wyandotte's complaint, and on May 13, 2011 a default judgment in favor of Wyandotte was entered in which the court awarded Wyandotte $188,037.12 in damages, plus time-price differential, statutory interest, attorney fees and costs.[27] Wyandotte obtained default judgment on the debt due from ETS.

On or about September 6, 2011, Wyandotte filed its motion for summary disposition on the validity and amount of Wyandotte's statutory bond claim against Westfield.[28] KEO and Westfield responded to the motion in primary reliance on *Pi-Con v A J Anderson Constr.,* 435 Mich 375; 458 NW2d 639 (1990) as Wyandotte could not prove that it served KEO written notice within thirty days of furnishing material in accordance with MCL § 129.207.[29] The court heard oral argument on November 4, 2011 and granted Wyandotte's motion.[30] The trial court found *Pi-Con* distinguishable and instead relied on a case that arose under the Insurance Code.[31] The court found the bond claim valid under the Act. The trial court also granted Wyandotte's request to recover 1.5% per month time-price differential charges and attorney fees against KEO and Westfield.

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[25] App 68a.
[26] App 73a.
[27] App p 106a.
[28] App 107a.
[29] App 147a.
[30] App 172a; App 178a.
[31] App 174a, line 2 – App 176a, line 2.

RECEIVED by MSC 3/31/2015 3:29:34 PM

KEO and Westfield filed a Motion for Reconsideration which focused on Wyandotte's failure to comply with the Act's ninety day notice requirement.[32] Wyandotte's ninety day notice was served more than ninety days after the last date for which the claim was made.[33] The court denied the motion for reconsideration.[34]

Given the court's orders regarding the validity of Wyandotte's bond claim and its entitlement to finance charges of 1.5% per month and attorney fees, the case proceeded to trial on narrow issues to be litigated.[35] Really, the trial boiled down to the ability of Wyandotte to prove its debt against ETS, against whom it already had default judgment. The court found that Wyandotte was due the principal amount of $154,343.29, time-price differential charges of $76,403.44, and that it had also incurred attorney fees in the amount of $30,000.[36]

Wyandotte moved for entry of judgment that included the above-listed amounts. In addition, Wyandotte requested post-judgment interest at the same monthly 1.5% per month rate pursuant to MCL 600.6013(7).[37] KEO and Westfield objected to the form of the judgment on the grounds that statutory judgment interest should accrue under MCL 600.6013(8).[38] The trial court granted Wyandotte's motion and overruled KEO and Wyandotte's objections.[39]

KEO and Westfield timely filed their Claim of Appeal. After oral argument, the Court of Appeals affirmed all of the lower court's rulings and judgment in an

[32] App 181a.
[33] App 175a.
[34] App 207a.
[35] App 210a.
[36] App 221a, lines 16-21; App 222a, lines 15-19.
[37] App 224a.
[38] App 243a.
[39] App 253a.

RECEIVED by MSC 3/31/2015 3:29:34 PM

unpublished opinion.[40] Wyandotte has since requested the opinion be published which the Court of Appeals has denied.[41]

The Court of Appeals held that Wyandotte complied with the thirty day notice requirement and was entitled to bond act protection.[42] The Court of Appeals held that so long as "the claimant uses the method of service outlined in the statute – certified mail – then proof of actual receipt is not required," and that, "There is no precedent for grafting an actual receipt requirement onto MCL 129.207 when the claimant uses certified mail."[43] The Court held that "Wyandotte complied with the statute and was not required to prove actual receipt" by the principal.

The Court also affirmed that KEO and Westfield were liable to Wyandotte for the finance charges and attorney fees contained in Wyandotte's credit application.[44] The Court of Appeals held those sums "justly due" under the Act, again without precedent. The Court found "unavailing" the fact that KEO never agreed to pay the attorney fees incurred by others or finance charges.[45]

The Court of Appeals also affirmed judgment interest pursuant to MCL § 600.6013(7) because it held that written instruments evidencing indebtedness with a specified rate existed in this case. The Court relied on the various documents that composed the contract between Wyandotte and ETS for the sale of goods to satisfy the

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[40] *Wyandotte Electric Supply v Electrical Tech Sys, Inc.*, unpublished opinion per curiam of the Court of Appeals, issued July 15, 2014 (Docket No. 313736) (App 255a).
[41] App 166a.
[42] *Wyandotte*, p 7
[43] *Wyandotte*, p 7
[44] *Wyandotte*, p 10
[45] *Wyandotte*, p 10

RECEIVED by MSC 3/31/2015 3:29:34 PM

requirement of certain written instruments evidencing debt to comply with the statute.[46] The Court of Appeals found that the time price differential could also be treated as a rate of interest "depending on the language of the case."[47] The Court of Appeals cited no authority for its holding on this issue and appears to have disregarded the plain language and legislative intent behind the enactment of MCL 600.6013(7).

ARGUMENT

A. The Court of Appeals erred in allowing a non-privity bond claimant to recover under the bond act even though it did not serve the principal contractor with statutory notice under MCL 129.207.

1. Standard of Review: This Court reviews de novo a trial court's decision to deny a motion for summary disposition.[48] Questions of statutory interpretation are also reviewed de novo. When construing a statute, this Court's primary goal is to give effect to the intent of the Legislature. We begin by construing the language of the statute itself. When the language is unambiguous, we give the words their plain meaning and apply the statute as written.[49] Appellate courts review for clear error a finding of compliance with public bond act notice requirements.[50]

2. Introduction: MCL 129.207 requires bond claimants to serve written notices upon a principal contractor for bond act protection on public works projects. It is undisputed in this case that Wyandotte did not serve and KEO did not receive the required thirty-day written notice from Wyandotte. Therefore, the Court of Appeals

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[46] *Wyandotte*, p 11
[47] *id.*
[48] *Rowland v Washtenaw Cnty Rd Comm.*, 477 Mich 197, 202; 731 NW2d 41 (2007)(citations omitted)
[49] *id.* (citation omitted)
[50] *W T Andrew Co., Inc. v Mid-State Sur. Corp.*, 221 Mich App 438, 440; 562 NW2d 206 (1997) citing MCR 2.613(C); *Tempco Heating & Cooling, Inc. v A Rea Constr., Inc.*, 178 Mich App 181, 191; 443 NW2d 486 (1989).

RECEIVED by MSC 3/31/2015 3:29:34 PM

erred when it affirmed the trial court to hold that Wyandotte complied with the bond act.

3. Law and Argument:

a. MCL 129.207 requires a bond claimant to serve written notice on the principal: To qualify for statutory protection under Michigan's Public Works Act, MCL § 129.201, et seq. ("the "Act"), a non-privity claimant must serve an initial written notice on the principal. MCL § 129.207 provides:

> "A claimant not having a direct contractual relationship with the principal contractor shall not have a right of action upon the payment bond unless (a) he has within 30 days after furnishing the first of such material or performing the first of such labor, ***served on the principal contractor a written notice***, which shall inform the principal of the nature of the materials being furnished or to be furnished, or labor being performed or to be performed and identifying the party contracting for such labor or materials and the site for the performance of such labor or the delivery of such materials, and (b) he has given written notice to the principal contractor and the governmental unit involved within 90 days from the date on which the claimant performed the last of the labor or furnished or supplied the last of the material for which the claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Each notice shall be served by mailing the same by certified mail, postage prepaid, in an envelope addressed to the principal contractor, the governmental unit involved, at any place at which said parties maintain a business or residence."

The statute requires a claimant to "serve" two (2) written notices. The initial written notice must be served within thirty (30) days after first furnishing labor or materials. The second written notice must be served within ninety (90) days from the

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last of the claimant's supply of labor or materials for which the claim is made.[51] Each of the notices must be served by certified mail, and include specific information required by statute.

The term "serve" is undefined in the statute. Courts may consult a dictionary to ascertain the meaning of an undefined term.[52] To "serve" means to "present (a person) with a notice or process as required by law <the defendant was served with process>."[53] Technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning.[54] For purposes of the bond act, the use of the term "serve" implies a more formal presentation of notice.[55] In other words, service of written notice means exactly that. The written notice must be served (presented) upon the principal to qualify for bond act protection under the statute.

The Legislature intended the notice provisions of the Act to protect public works bonds from claims by materialmen and subcontractors of whose participation on the project the general contractor was not notified.[56] In affirming the trial court, the Court of Appeals erroneously disregarded the statute's plain words. Wyandotte's *attempted* service upon KEO is not sufficient. Instead of resolving the case on whether KEO received the written notice, the Court of Appeals erroneously focused on Wyandotte's failed effort to serve written notice through certified mail. Wyandotte's effort to "serve"

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[51] *W T Andrew,* p 440.
[52] *Consumers Power Co. v Public Service Comm.,* 460 Mich 148, 163, n. 10; 596 NW2d 126 (1999) citing MCL § 8.3a.
[53] Black's Law Dictionary (7th ed).
[54] MCL § 8.3a; *Yaldo v North Pointe Ins Co.*, 457 Mich 341, 357; 578 NW2d 274 (1998).
[55] *Thomas Industries, Inc. v C&L Electric, Inc.*, 216 Mich App 603, 609-610; 550 NW2d 558 (1996).
[56] *Pi Con v A J Anderson Constr Co.,* 435 Mich 375, 386; 458 NW2d 639 (1990).

RECEIVED by MSC 3/31/2015 3:29:34 PM

the notice by using certified mail not delivered should have resulted in dismissal of the bond claim.

Moreover, who best to bear the risk of non-service of statutory notice than the claimant on whose burden service falls? Service of written notice is intended to *notify* the principal. The written notice is intended to ensure that "principal contractors [have] knowledge regarding any possible claims to which their bonds might later be subjected."[57] MCL § 129.207 *requires* subcontractors and materialmen to "inform the principal of the nature of the material being furnished or to be furnished . . . and identifying . . . the site for . . . delivery of such materials."[58] Indeed, to qualify for bond act protection, the non-privity bond claimant bears the burden to notify the principal of its involvement on the construction project. A mere effort to notify the principal is not enough, as held time and again by courts of this state.

This case amplifies the burden on a bond claimant to protect its rights under the bond act, because Wyandotte *knew* that its effort to serve written notice on KEO failed. Its credit manager acknowledged failed service of written notice in its letter to Westfield dated February 1, 2011.[59] Obviously, bond claimants are in the best position to ensure principal contractors receive written notice because bond claimants are in control of the process to obtain service. The risk of insufficient service should be imposed on the party that is *responsible* for serving the notice, i.e. the party with whom the principal did not

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[57] *Grand Blanc Cement Products, Inc. v Insurance Company of North America*, 225 Mich App 138, 145; 571 NW2d 221 (1997), citing *Pi-Con*, p 383-384.
[58] *id.*
[59] App 162a.

RECEIVED by MSC 3/31/2015 3:29:34 PM

contract: the non-privity bond claimant. There is no policy or rational reason to impose the risk of non-service on the principal or surety.

In addition, needless confusion will result amongst contractors, sureties, claimants and those that represent them should bond claimants be entitled to bond act protection despite not having served written notice under the statute. The erroneous Court of Appeals decision will result in situations where bond claimants that make an effort to serve written notice by certified mail need *not* prove actual receipt by the principal, but bond claimants that disregard the statute's certified mailing requirement, must prove actual receipt. That should obviously not be the case or rule of law in Michigan. There should be no bond act protection by merely showing a certified mail envelope was not delivered to the principal. The written notice requirements of the bond act are intended to *benefit* the principal and surety, not shift risk upon them.

The written notice "shall inform" the principal of the "nature of materials" and other required information. Clearly, to further that requirement, the written notice must obviously first be served upon and received by the principal. In this case, it was not. The Court of Appeals' comparison of service methods of MCL § 129.207 to a host of other statutes is unavailing, especially where MCL § 129.207 unequivocally requires the notice be *served* on the principal, and this Court has already expressly affirmed that point. The Court of Appeals erred.

b. Bond claimants must strictly comply with statutory notice requirements of MCL 129.207: Bond claimants must strictly comply with public act

RECEIVED by MSC 3/31/2015 3:29:34 PM

notice requirements in Michigan.[60] *Pi-Con* established the prima facie elements a claimant must satisfy to establish proper notice under MCL § 129.207:

> [T]hat a claimant on a bond may maintain an action on the bond upon establishing compliance with four substantive elements of the notice provisions of MCL 129.207; MSA 5.2321(7).
>
> First, a claimant must prove that the principal contractor actually received notice.
>
> Second, the notice must relate to "the nature of the materials being furnished or to be furnished, or labor being performed or to be performed and identify [] the party contracting for such labor or materials and the site for the performance of such labor or the delivery of such materials . . .
>
> Third, the notice sent must have been written.
>
> Fourth, the notice must have been received within the time limits prescribed by statute.

This Court placed heavy emphasis on the fact that the principal in *Pi-Con* actually received written notice regardless of the delivery method. In *Pi-Con* the bond claimant served its notice by first class mail.[61] The principal contractor and surety contended the claimant did not comply with the Act because its notice was not served by certified mail. The Court of Appeals held the written notice by first class mail was insufficient.[62] This Court reversed.

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[60] *Pi-Con*; *Square D Environmental Corp v Aero Mechanical, Inc.*, 119 Mich App 740, 744; 326 NW2d 629 (1982); *John A. Hall Construction Co. v Boone & Darr, Inc.*, 102 Mich App 786, 795-796; 302 NW2d 850 (1981) lv. den. 414 Mich 874 (1982); *Grand Blanc*, p 144 citing *Tempco*, p 190; *Charles W. Anderson Co. v Argonaut Ins. Co.*, 62 Mich App 650, 651-654; 233 NW2d 691 (1975).

[61] *Pi-Con*, p 380

[62] *Pi-Con*, 169 Mich App at 396

RECEIVED by MSC 3/31/2015 3:29:34 PM

This Court found the fact that the principal actually received the notice critical in finding compliance with the Act and satisfying the notice requirements.[63] Indeed, "so long as Pi-Con sent notice which otherwise complies with the notice requirements of the public works bond act, MCL § 129.207; MSA § 5.2321(7), and Pi-Con *proves by a preponderance of the evidence that Anderson timely received notice*, Pi-Con's failure to send notice via certified mail will not preclude recovery on the bond."[64] In other words, the purpose of the notice provision was satisfied because written notice was *received* by the principal with the necessary information required by statute regardless of the delivery method. This Court announced in *Pi-Con* that a principal contractor's *actual receipt* of written notice is the very first element a bond claimant must prove "by a preponderance of the evidence" to recover against the surety under MCL § 129.207.

Clearly, *Pi-Con* did not create a mere exception in public works cases. Its holding is not limited to apply only in circumstances where bond claimants attempt service by first class mail. This Court looked at federal Miller Act jurisprudence in *Pi-Con*. The federal Miller Act, 40 U.S.C. 270b(a), is the federal public works bond statute on which Michigan's "little Miller Act" was modeled.[65] The United States Supreme Court case of *Fleisher Engineering & Construction Co. v United States ex rel. Hallenbeck*, 311 U.S. 15; 61 S.Ct. 81; 85 L.Ed. 12 (1940) played a large role in the *Pi-Con* decision.

The *Fleisher* court interpreted the "certified mailing" requirement of the federal Miller Act to find that, ". . . the purpose of this provision [notice by certified mail requirement] as to manner of service was to assure receipt of the notice..." And, further

[63] *Pi-Con*, p 379
[64] *id.* (emphasis added)
[65] *Pi-Con*, p 381.

RECEIVED by MSC 3/31/2015 3:29:34 PM

that, "It is not reasonable to suppose that Congress intended to insist upon an idle form."[66] For Michigan, this Court agreed:

> We view the certified mail requirement as substantive. The Legislature, recognizing the vagaries of ordinary first-class mail, required certified mailing as a way to better ensure actual receipt of the notice. The Legislature intended to protect public works bonds from claims by materialmen and subcontractors of whose participation on the project the general contractor was not notified.[67]

The *Pi-Con* holding is unequivocal:

> We look to *Fleisher* in establishing...that the principal contractor must actually receive notice in order for a claimant to perfect its right on the bond.[68]

The Court of Appeals clearly erred in this case by disregarding the plain language of MCL § 129.207 and instruction of *Pi-Con* when it allowed Wyandotte to recover on the bond despite conceding that KEO did not receive thirty-day written notice.

Under the doctrine of stare decisis, "principles of law deliberately examined and decided by a court of competent jurisdiction should not be lightly departed." Indeed, in order to " 'avoid an arbitrary discretion in the courts, it is indispensable that [courts] should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them....'" The doctrine "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived

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[66] *Fleisher*, p 19.
[67] *Pi-Con*, p 386.
[68] *Pi-Con*, p 383.

RECEIVED by MSC 3/31/2015 3:29:34 PM

integrity of the judicial process."[69] However, the Court of Appeals' decision in this case departs from prior precedent, creates needless confusion, and should be reversed.

Besides *Pi-Con*, many other published decisions interpreting the Act favor reversal. In *W T Andrew Co., v Mid-State Sur. Corp.,* 221 Mich App 438, 441; 562 NW2d 206 (1997), a case which found its way to this Court on two separate occasions, the Court of Appeals, on initial remand from this Court, rejected the bond claim because the claimant failed to serve notice. Like Wyandotte in this case, the claimant in *W T Andrew* produced "no evidence that [it] notified the principal, surety or the [owner] within thirty days of first delivery."[70] Therefore, there was no bond act protection because the written notice was not served. Recovery was properly denied the bond claimant.

In *Grand Blanc*, the Court of Appeals allowed a bond claimant to recover under MCL 129.207 because it proved service of written notice on the principal contractor. The bond claimant entered two separate contracts on the same project with two different start dates.[71] The surety argued that the bond claimant's failure to serve written notice in connection with the first contract defeated the claimant's ability to achieve bond act protection under its subsequent contract. The Court of Appeals disagreed.

A bond claimant must always prove actual receipt by the principal according to *Pi-Con*, and *Grand Blanc* amplifies the importance of the particularity required within

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[69] *McCormick v Carrier,* 487 Mich 180, 209-210; 795 NW2d 571 (2010).
[70] *W T Andrew*, p 441.
[71] *Grand Blanc,* p 141-142.

RECEIVED by MSC 3/31/2015 3:29:34 PM

the written notice. The *Grand Blanc* court held that the thirty day notice period of MCL 129.207 is specific to each new and independent contractual arrangement.

> Subcontractors and materialmen must notify the principal regarding each contractual arrangement for which they seek protection under the bond act. Otherwise, the notice requirement would lack consequence because the principal contractor could be subjected to bond act claims bearing little or no similarity to the labor or materials identified in the claimant's original notice. Indeed, the principal would hardly remain abreast of prospective claims on the surety if a claimant's notification regarding an agreement to supply bricks were deemed to cover a claimant's subsequent agreement to provide cement.[72]

Again, the underlying theme for bond act protection is the necessity for the claimant to prove actual written notice served upon the principal. Specifically, the written notice must notify the principal of the nature of goods and services to be furnished, and for which the principal's bond could be subject to claim. The principal is entitled to be kept "abreast of prospective claims on the surety,"[73] which is exactly what *did not* happen in this case.

In *Tempco Heating and Cooling, Inc. v A. Rea Const., Inc.* 178 Mich App 181, 190; 443 NW2d 486 (1989), the Court of Appeals reversed the trial court and denied recovery to the bond claimant. Bond claimants must strictly comply with the act's notice requirements.[74] In *Tempco*, the bond claimant's written notice was served but it was not served on time.[75] During the *Tempco* litigation, the bond claimant contradicted its date of first delivery. The Court of Appeals rejected the claim as untimely. The claimant

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[72] *Grand Blanc*, p 146
[73] *id.*
[74] *Tempo*, p 190
[75] *Tempco*, p 191

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also "presented no proofs that the ninety-day notice requirement was satisfied as to the principal contractor.[76] Recovery was denied. The bond claimant did not strictly or timely comply with MCL § 129.207.

Thomas Industries, Inc. v C&L Electric, Inc., 216 Mich App 603; 550 NW 2d 558 (1996) is another published decision where the bond claimant was denied bond act protection as failing to properly serve its thirty day notice. The bond claimant was a material supplier and argued that its material packing slips to the job site satisfied MCL § 129.207. The Court disagreed, despite the fact that some form of written notice was given and received. "Condition a of § 7 requires the written notice to be 'served' on the principal contractor. The use of the term 'served' implies a more formal presentation of notice, rather than the informal and haphazard notice given through the use of a packing slip. . . the notice required under condition a of § 7 serves the purpose of giving the principal contractor the earliest possible notification that the materialman has not been paid for materials and supplies and that the materialman may make either a future demand for payment or future claim against the payment bond."[77] Bond act protection was denied because, "There is no evidence that the packing slips were received or seen by, or called to the attention of, the person or persons who would have received and been responsible for receiving the notice had it been properly served under the statute."[78]

Likewise, Wyandotte is not entitled to bond act protection. It did not strictly comply with the Act's notice requirements because KEO never received written notice.

[76] *Tempco*, p 192
[77] *Thomas*, p 609-610 citing *Pi-Con*, p 386
[78] *Thomas*, p 610

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Identical to the failed bond claimants in *Tempco* and *W T Andrew*, it is undisputed that Wyandotte did not and could not prove that KEO received actual written notice under MCL § 129.207, regardless of the reason. Wyandotte conceded its notice was not served, yet both the trial court and Court of Appeals glossed over this fatal defect.

Moreover, Wyandotte *knew* its effort at service failed at the time. The fact that Wyandotte allegedly placed its thirty day notice in a certified mail envelope directed to the principal, yet could not prove service or actual receipt by the principal, should have been fatal to its bond claim, in line with the statute's plain language and our state's jurisprudence on the issue.[79]

KEO and Westfield are now faced with liabilities to a non-privity bond claimant that the statute and case law was designed to prevent. KEO was not served with thirty day notice, and Wyandotte kept silent knowing its thirty day notice was not served. During that time, KEO paid $248,000.00 to ETS. Those funds were intended to pay for the materials incorporated into the bonded project. KEO was not kept "abreast" of Wyandotte's potential claim because Wyandotte did not serve its required notice. The Court of Appeals should be reversed.

B. The Court of Appeals erred in allowing Wyandotte to recover its attorney fees and time-price service charges from KEO and Westfield.

1. Standard of Review: Issues of statutory interpretation are reviewed de novo.[80] Where reasonable minds may differ about the meaning of a statute, we look to

[79] There is no evidence in the record of KEO's refusal to accept delivery or some other effort to avoid service of Wyandotte's failed thirty day notice.

[80] *Sotelo v Grant Twp.*, 470 Mich 95, 100; 680 NW2d 381 (2004).

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the objective of the statute and the harm it is designed to remedy and apply a reasonable construction that best accomplishes the legislature's purpose.[81]

2. Introduction: A principal contractor and its surety should not be held liable to pay a bond claimant's attorney fees and time-price service charges where the principal never agreed to pay those fees and charges. KEO, as principal, did not contract with Wyandotte, and did not materially bargain to pay attorney fees or time-price differential for materials delivered to the project. This is an issue of first impression for the courts of this state, and need not be reached if Issue I properly disposes the claim. If decided, this Court should not broadly declare that a principal is automatically liable to pay a bond claimant's attorney fees and time price charges as a sum "justly due" where the principal and bond claimant are not in privity of contract and simply because the bond claimant's contract with another may include those provisions.

3. Argument and Law:

a. Time price charges and attorney fees are not justly due from the principal or surety when the principal did not agree to pay them: A bond claimant is entitled to payment of sums "justly due" under the bond act. MCL 129.207 provides:

> A claimant who has furnished labor or material in the prosecution of the work provided for in such contract in respect of which payment bond is furnished under the provisions of section 3, and who has not been paid in full therefor before the expiration of a period of 90 days after the day on which the last of the labor was done or

[81] *Grand Blanc*, p 143.

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> performed by him or material was furnished or supplied by him for which claims is made, may sue on the payment bond for the amount, or balance thereof, unpaid at the time of institution of the civil action, prosecute such action to final judgment for the sum justly due him and have execution thereon.

The fundamental purpose of any rule of statutory construction, of course, is to assist the court in discovering and giving effect to the intent of the Legislature.[82] However, literal constructions that produce unreasonable and unjust results that are inconsistent with the purpose of the act should be avoided.[83]

The bond act is designed to be "remedial in nature and, therefore, should be liberally construed."[84] The Legislature adopted MCL 129.201, et seq; MSA 5.2321(1) to protect contractors and materialmen in the public sector to ensure that they do not suffer injury when other contractors default on their obligations. Without this legislation, contractors and materialmen "were denied the security afforded when the identical work or materials were provided to the private sector."[85]

To protect contractors and materialmen on *privately* owned improvements, the Legislature adopted the Michigan Construction Lien Act, MCL 570.1101, et seq. (the "Lien Act"). The Lien Act is more liberally construed than the public works bond act given the differences in the applicable areas of law involved.[86] The Lien Act was intended to protect the interests of contractors, workers, and suppliers through

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[82] *Grand Blanc*, p 143
[83] *id.*
[84] *W T Andrew*, p 659 (citations omitted)
[85] *Id.*
[86] *Square D*, p 743

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construction liens, while protecting owners from excessive costs.[87] It is to be liberally construed to effectuate these purposes.[88]

The Lien Act provides that "each contractor, subcontractor, supplier, or laborer who provides an improvement to real property *has a construction lien* upon the interest of the owner or lessee who contracted for the improvement for the real property."[89] Therefore, the payment security afforded to contractors and materialmen on private projects is a construction lien upon the owner or lessee's interest in the privately owned real estate.

Municipalities on the other hand engage public works contractors to perform on publicly owned projects. Contractors cannot record liens against public works. Oftentimes public projects are let by public bid that are highly regulated.[90] Public property is not subject to construction liens, and therefore, the law imposes a requirement on the principal contractor to supply performance and payment bonds before construction can begin on any building project exceeding $50,000 in value.[91] The principal contractor and its surety provide security for payment on public projects, even though the public owner is the ultimate beneficiary of the improvement.

Surety law in Michigan is well established. A suretyship requires three parties; a principal, an obligee, and a surety.[92] "A surety is one who undertakes to pay money or

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[87] *Alan Custom Homes, Inc. v Krol*, 256 Mich App 505, 508; 667 NW2d 379 (2003) citing *Vugterveen Sys. Inc. v Olde Millpond Corp.*, 454 Mich 119, 121; 560 NW2d 43 (1997); *M.D. Marinich, Inc. v Michigan Nat'l Bank*, 193 Mich App 447, 453; 484 NW2d 738 (1992).
[88] *id*; MCL § 570.1302(1).
[89] MCL § 570.1107 (emphasis added)
[90] *Square D*, p 744
[91] MCL § 129.201
[92] *Will H. Hall & Son, Inc. v Ace Masonry Const Inc.*, 260 Mich App 222, 228; 677 NW2d 51 (2003).

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take any other action if the principal fails therein."[93] "The liability of a surety is limited by the scope of the liability of its principal and the precise terms of the surety agreement."[94]

In *Ann Arbor v Massachusetts Bonding & Ins. Co.,* 282 Mich 378, 380; 276 NW 486 (1937) this Court stated that:

> The undertaking of a surety is to receive a strict interpretation. The surety has a right to stand on the very terms of the contract. To the extent and in the manner and under the circumstances pointed out in his obligation, the surety is bound, and no further. ***The liability of a surety is not to be extended by implication beyond the terms of his contract.*** (emphasis added; citation omitted). A surety cannot be held beyond the precise terms of his agreement. (citation omitted). As said by Chancellor Kent, "The claim against a surety is *strictissimi juris.*" (citation omitted)

A surety may plead any defense available to its principal, and if no action can be maintained by the obligee against the principal, none can be maintained against the surety.[95] The Court in *Will H. Hall & Son,* pp 228-229, further clarified that:

> "The liability of a surety is limited by the scope of the liability of its principal and the precise terms of the surety agreement." In general, ***a surety may plead any defense available to the principal,*** and the liability of the surety is coextensive with the liability of the principal in the bond and can be extended no further. (emphasis in original, citations omitted).

Simply put, a surety can never be liable for anything more than its principal, if any liability is imposed at all. As a secondary obligor, sureties universally require its

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[93] *id.*, p 228-229.
[94] *id.*(citation and quotation marks omitted)
[95] 23 Mich. Civil Jurisprudence, Suretyship, § 47, p 100; *Ackron Contracting Co. v Oakland County,* 108 Mich App 767, 772; 310 NW2d 874 (1981).

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principals to provide collateral in the form of broad indemnity agreements. A surety typically requires individual shareholders, affiliated entities, and even spouses to personally guaranty and indemnify the surety from and against any and all losses and costs incurred by the surety for the issuance of any particular bond. Upon a loss, the surety looks to its indemnitors for reimbursement. Liability on bond losses does not end with the surety. Sureties have contractual and equitable rights against its principal and indemnitors for bond losses.

This is one reason why a surety bond is far different from a policy of insurance. A suretyship is a three party agreement of guaranty payment or performance of the principal, whereas an insurance policy is an "agreement to pay a sum of money upon the occurrence of a specified event."[96] An insurance contract is a two party agreement between the insurer and insured to protect the insured against an insurable risk. As a general rule, insurance policies are construed strictly against the insurer.[97] Surety bonds are not policies of insurance. They are three-party performance and payment guaranties .

A surety should not be held liable to pay time-price differential charges and attorney fees where its principal did not agree to pay them. KEO, as principal, was awarded the public work from the City of Detroit and engaged its subcontractors, including ETS under stringent subcontract terms that favored KEO.[98] The 2009 subcontract between KEO and ETS imposes the same duties on ETS as those imposed upon KEO by the Owner. The agreement conditions payment to ETS upon KEO's receipt

[96] *Kewin v Massachusetts Mut. Life Ins. Co.*, 409 Mich 401, 417; 295 NW2d 50 (1980) (citations omitted).
[97] *Royal Globe Ins. Cos. V Frankenmuth Mut. Ins. Co.*, 419 Mich 565, 573; 357 NW2d 896 (1975) (citations omitted).
[98] App 21a.

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of payment from the Owner. It sets forth many other conditions precedent to the release of payment, all of which are relatively typical subcontract provisions within the construction industry.[99]

KEO did not agree to pay attorney fees or time-price differential to ETS. As to be expected, KEO's subcontract favors KEO to minimize risk to itself, its surety, and ultimately, to minimize the risk to its indemnitors on the bond. The Court of Appeals decision in this case abolishes those efforts and the common law to go along with it.

This Court should not broadly interpret the bond act to generally bind a principal and its surety to pay a bond claimant's attorney fees, time-price charges and any other payment term to which the principal never agreed. The cardinal rule of statutory construction, [is] that statutes will not be extended by implication to abrogate the established rules of common law.[100] The Legislature should speak in no uncertain manner when it seeks to abrogate the plain and long-established rules of the common law.[101] "In the absence of a contrary expression by the Legislature, well-settled common-law principles are not to be abolished by implication in the guise of statutory construction."[102] No court of this state has imposed time price differential and attorney fees as a sum "justly due" from a party that never agreed to pay them. The Court of Appeals erroneously created new law in this case without a proper or careful analysis.

b. Allowing a bond claimant to recover attorney fees or time price service charges from the principal under the bond act is impermissible

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[99] App 21a, Article 2.1, 5.1-5.13

[100] *Silver v International Paper Co.*, 35 Mich App 469; 192 NW2d 535, 536 (1971), citing *Bandfield v Bandfield*, 117 Mich 80; 75 NW 287 (1898).

[101] *Bandfield v Bandfield*, 117 Mich 80, 82; 75 NW 287 (1898).

[102] *Marquis v Hartford Acc & Indem.*, 444 Mich 638, 652-653; 513 NW2d 799 (1994).

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judicial construction: The bond act does not provide for the recovery of attorney fees. Michigan follows the "American rule," which provides that, unless a statute, court rule, or contractual provision specifically provides otherwise, attorney fees are not to be awarded by the court.[103] The United States Court of Appeals for the Sixth Circuit recognized that the Act does not "make[] any provision for the award of attorney fees" when that court rejected an attorney fee requested under the same statute at issue here.[104] The bond act includes no reference whatsoever, mandatory or discretionary, for the award of an attorney fee to a prevailing bond claimant. [105]

The principal and bond claimant in this case are not in privity of contract. No agreement at all exists on the principal's part to pay the attorney fees of others. No statute, court rule or contractual provision between the principal contractor, surety, or bond claimant exists in this case to require either KEO or Westfield to pay the attorney fees incurred by another. With little analysis or authority, the lower court erroneously concluded Wyandotte's attorney fees were included as a sum "justly due" from the principal and surety where no statute, court rule or contract exists binding the principal to pay the bond claimant's attorney fees.

Michigan courts routinely reject attorney fee requests where the Legislature has not directly spoken on the subject. A good example is found in *Nemeth v Abonmarche Development, Inc.,* 457 Mich 16; 576 NW2d 641 (1998) where this Court affirmed the Court of Appeals in concluding that attorney fees are not included in the broad

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[103] *Watkins v Manchester*, 220 Mich App 337, 342; 559 NW2d 81 (1996).
[104] *Hub Elec. Co., v Gust Const. Co.,* 585 F.2d 183, 188 (ED Mich 1978).
[105] Contrast Section 118(2) of the Lien Act which provides, "The court may allow reasonable attorneys' fees to a lien claimant who is the prevailing party." MCL § 570.1118(2)

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description of "costs" that may be apportioned under Michigan's Environmental Protection Act, MCL § 324.1701, et seq.[106] The Court recognized in *Nemeth* that "the Legislature knows how to provide for attorney fees when enacting a statute and has done so on many occasions."[107] The same should hold true here. If the Legislature had intended to award attorney fees under the bond act, it should have said so. The bond act is silent on the point.

Yet, KEO and Westfield were held liable to pay Wyandotte's attorney fees merely because ETS agreed to pay them. Wyandotte's contractual attorney fee provision is contained in a credit application that ETS entered to obtain materials from Wyandotte in 2003.[108] That bargain between those entities was entered without any knowledge or relevancy to KEO's performance as principal contractor on the project that started in 2009. The Court of Appeals erred when it declared Wyandotte's attorney fees as "justly due" when not agreed upon by the principal.

The same holds true for time price differential and finance charges. Extra time price charges are properly imposed upon principal contractors (and their sureties) upon express agreement of the principal to pay those charges. *Price Bros Co v C J Rogers Constr Co*, 104 Mich App 369, 379; 304 NW2d 584 (1981) was such a situation. *Price Bros.* was a contract action for the sale of goods between an excavation contractor, who was principal on the bond, and a material sewer supplier who sold the goods. The supplier sued the principal for payment under their written contract. The principal

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[106] *Nemeth*, p 43

[107] *Nemeth*, p 42; See also *Burnside v State Farm Fire & Cas Co*, 208 Mich App 422; 528 NW2d 749 (1995), holding attorney fees not recoverable under the Uniform Trade Practices Act because the statute was silent.

[108] App 10a.

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alleged the goods were non-conforming and counter-sued. Defendant Aetna was the principal's surety on project.[109] The bond act was referenced in the payment bond.[110] At trial, the supplier was awarded judgment against the contractor and surety for amounts owing on the project. The surety appealed.

The Court of Appeals affirmed the lower court. It affirmed the principal's counter-claim against the supplier dismissed and found that the principal agreed to pay "service charge of 1 ½ percent per month on the unpaid balance . . ." to the supplier in their written agreement. Therefore, the principal's surety was held liable to pay those charges.[111] The surety was held co-extensively liable with its principal.

However, the *Price Bros.* court went unnecessarily further. It imposed liability on the surety in an opaque analysis determined upon supposed "integral" contract terms and "flexible price factors." The Court of Appeals found that the one-and-one half percent monthly service charge was an "integral part" of the principal's contract.[112] It further determined the time price differential to be a "flexible price factor" of the transaction between principal and bond claimant.[113] The court's strained holding comes down to the last paragraph of the opinion which says:

> On a purely hypothetical plane, finance charges may be seen as inextricably related to the enhanced value of the project and thus properly included within the terms of the payment bond. If the contractor's agreement to pay finance charges is in fact a condition precedent to delivery without simultaneous cash payment (COD), then the value of the property or project on which the materials are used is

[109] *Price Bros.*, p 371-372
[110] *Price Bros.*, p 376
[111] *Price Bros.*, p 376
[112] *Price Bros.*, p 379
[113] *Price Bros.*, p 377.

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> enhanced by such agreement. Otherwise, the materials supplier may refuse to deliver the goods and the project is stalled until another supplier is found. As such, we are persuaded that the surety is liable for the service charge, given that it was clearly an integral part of the contract between plaintiff and Rogers.

This Court should abstain from re-affirming or endorsing the "purely hypothetical plane" holding of *Price Bros.* To cement a surety's liability to pay a bond claimant's finance charges under the bond act regardless of whether its principal agreed to pay them should be rejected by this Court. Better yet, this Court should take the opportunity to reject the "integral term" and "flexible price factor" analysis of *Price Bros.* The court in *Price Bros.* did not speak to whether the time price differential was awarded as a sum "justly due" under MCL § 129.207. Rather, the principal undertook an obligation to pay based on credit, which likewise bound its surety. That case should have been resolved on the much more narrow ground that the principal's bargain to pay finance charges bound its surety.

The remote time-price differential charge imposed by Wyandotte upon ETS in this case certainly did not "enhance the value" of the project. The judgment against KEO and Westfield includes $76,403.44 of time price differential charges through August 24, 2012 which presumably represents the "enhanced value" envisioned by the *Price Bros.* court.[114] Wyandotte failed to adhere to its own credit terms by continuing to ship materials despite nonpayment from ETS.[115] In continuing its shipments, Wyandotte was relying upon the creditworthiness of the principal and surety, not its customer. Eventually, toward the end of the project, Wyandotte finally required and received cash

[114] App 253a.
[115] App 10a.

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on delivery payments from ETS in exchange for its final shipments to the project.[116] KEO even made a direct payment to Wyandotte at the conclusion of the project.[117]

Price Bros. should not be interpreted to stand for the misguided notion that the bond act expands the surety's liability beyond what its principal may have assumed. Indeed, it should be said that if a principal and those in control (indemnitors) bargain for, agree upon and decide to engage onerous credit terms with a material supplier, those terms should properly be imposed against the principal, surety and ultimately, the individual indemnitors pursuant to their contracts.

But, the Court of Appeals in this case erroneously extended *Price Bros.* to apply to these facts and incredibly found the clear distinction between *Price Bros.* and this case "unavailing." The Court of Appeals erred by finding that, "In *Price Bros.,* the surety was attempting to avoid extra cost measures under a remote contract." Even though the principal in *Price Bros. agreed* to pay time price differential to the bond claimant.

In addition to its failure to properly distinguish *Price Bros.* from this action, the Court of Appeals also failed to cite *Grand Blanc* even though *Grand Blanc* is a similar on-point decision. In *Grand Blanc,* the Court of Appeals affirmed the trial court's refusal to include time-price service charges in its judgment against a surety, precisely because the principal did not agree to pay the bond claimant those charges.[118]

The bond claimant's contract in *Grand Blanc* included a time-price differential charge. The claimant obtained judgment against the surety under the bond act. However, the lower court did not include time-price differential in the bond claimant's

[116] App 205a, ¶ I, L, P, Q, R, S.
[117] App 211a, ¶ G.
[118] *Grand Blanc*, p 150.

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judgment against the surety for reasons unknown in the record.[119] The supplier appealed. It requested an award of time-price charges against the surety, but the Court of Appeals refused. The Court of Appeals properly relied and cited the bedrock surety maxims cited herein. The court recognized that while MCL § 129.207 entitles a claimant under the bond act to prosecute its suit for a judgment for the amount unpaid at the time of the civil action, "the liability of the sureties is coextensive with the liability of the principal in the bond, and can be extended no further than his."[120] The same holds true here.

The Court of Appeals in this case missed the issue. The issue is not whether MCL 129.207 "*precludes* time-price differentials and attorney fees from the amount due the surety,"[121] but rather, whether the statute *provides* for the inclusion of amounts above and beyond the value of improvements against the principal, which would be a clear departure from surety common law.

> The Legislature should speak in no uncertain manner when it seeks to abrogate the plain and long–established rules of the common law. Courts should not be left to construction to sustain such bold innovations. The rule is thus stated in 9 Bac. Abr. tit. "Statutes," I, p. 245: "In all doubtful matters, and when the expression is in general terms, statutes are to receive such a construction as may be agreeable to the rules of the common law in cases of that nature; for statutes are not presumed to make any alteration of the common law, further or otherwise than the act expressly declares. Therefore in all general matters the law presumes the act

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[119] *id.*

[120] *Grand Blanc,* p 150; *In re MacDonald Estate,* 341 Mich 382, 386; 67 NW2d 227 (1954), quoting *Ward v Tinkham,* 65 Mich 695, 703; 32 NW 901 (1887); see also *Timmerman v Hartford Accident & Indemnity Co.,* 243 Mich 338, 342, 220 NW 752 (1928); *Ackron,* 772.

[121] *Wyandotte,* p 9.

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> did not intend to make any alteration; for, if the parliament had that design, they should have expressed it in the act.[122]

This Court should affirm that a surety is only co-extensively liable with that of its principal and reverse the Court of Appeals.

Additional policy considerations exist too in favor of the surety. Unpaid subcontractors and suppliers look to the surety as a secondary source of payment on public works projects. It must be recognized that the mere fact that a bond claimant makes a claim does not automatically entitle the claimant to payment. The claimant's work may be defective or incomplete, or some other justification may exist to deny payment, such as not complying with written notice requirements, like in this case. As such, the surety and principal are entitled to investigate and potentially contest the claim.

Should this Court broadly impose attorney fees and time price charges under the bond act as sums "justly due" then sureties may be more inclined to pay dubious claims to avoid higher charges. In that circumstance, the surety risks losing its indemnification rights from the principal and indemnitors who can argue they should not be liable for the surety's "voluntary" or "bad faith" payment to the claimant. Thus, a surety finds itself in an unnecessarily dilemma. If the bond act imposes attorney fees and time price charges, the surety will have incentive to pay suspect claims early, yet run the risk of losing reimbursement from its principal and indemnitors.

In addition, a surety's liability is limited to the penal sum of its bond.[123] There is a cap on liability. The cap is typically the estimated total value of the improvement,

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[122] *Bandfield*, 82.

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which does *not* include attorney fees and interest. The ability of other bond claimants to recover against the bond is reduced if time price charges and attorney fees are imposed.

This Court is presented the opportunity to speak on this issue of first impression should it choose. The bond act should be kept simple. In cases where the principal and bond claimant do not agree otherwise between one another, attorney fees should not be recoverable because the statute does not provide for them, and this court should hold that time price differential are not sums "justly due" from the principal and surety where not agreed to by the prnicipal. This Court should reverse.

C. The Court of Appeals erred in affirming judgment interest under MCL § 600.6013(7) where a money judgment was entered and no written instrument evidencing indebtedness with a specified rate exists.

1. Standard of Review: This issue is based on statutory interpretation and application and is therefore reviewed de novo.[124]

2. Introduction: A contested money judgment was entered in this case against KEO and Westfield, and the sale of goods contract between ETS and Wyandotte, which allegedly consists of several different agreements, is not "a written instrument evidencing indebtedness with a specified rate of interest" under MCL §

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[123] Michigan law has long recognized that a surety is only liable for the amount of the performance bond. See, e.g., *Graff v Epstein*, 238 Mich 227, 232; 213 NW 190 (1927) ("Of course, liability of the sureties cannot exceed the penalty of the bond"); *Fidelity & Deposit Co of Maryland v Cody*, 278 Mich 435, 444; 270 NW 739 (1936) (holding that "the penalty of the respective bonds is the measure of the total liability of the surety company"); *Shambleau v Hoyt*, 265 Mich 560, 573; 251 NW 778 (1933) (holding that "defendants and their surety bound themselves to the extent of the penal sum of the bond"); *Vreeland v Loeckner*, 88 Mich 93, 95; 57 NW 1093 (1894) ("The judgment is valid in its entirety as to the principal defendant, but void as to the surety in the excess over the penal sum of the bond"); *Spencer v Perry*, 18 Mich 394, 399-400 (1869) (holding that it is generally understood that bonds "fix the limit beyond which the liability of the defendant should not extend," and noting that if the parties intended to provide for indefinite liability, they could have entered into a different type of agreement.

[124] *Yaldo v North Pointe Ins Co.*, 457 Mich 341, 344; 578 NW2d 274 (1998).

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600.6013(7). The Court of Appeals ignored Legislative intent, and thereby erred in holding otherwise.

3. Argument and Law:

a. MCL § 600.6013(8) should apply to the money judgment entered if this Court affirms: MCL § 600.6013 provides in pertinent part:

> (7) For a complaint filed on or after July 1, 2002, if a judgment is rendered on a written instrument evidencing indebtedness with a specified interest rate, interest is calculated from the date of filing the complaint to the date of satisfaction of the judgment at the rate specified in the instrument if the rate was legal at the time the instrument was executed. If the rate in the written instrument is a variable rate, interest shall be fixed at the rate in effect under the instrument at the time the complaint is filed. The rate under this subsection shall not exceed 13% per year compounded annually.
>
> (8) Except as otherwise provided in subsections (5) and (7) and subject to subsection (13), for complaints filed on or after January 1, 1987, interest on a money judgment recovered in a civil action is calculated at 6-month intervals from the date of filing the complaint at a rate of interest equal to 1% plus the average interest rate paid at auctions of 5-year United States treasury notes during the 6 months immediately preceding July 1 and January 1, as certified by the state treasurer, and compounded annually, according to this section. Interest under this subsection is calculated on the entire amount of the money judgment, including attorney fees and other costs. The amount of interest attributable to that part of the money judgment from which attorney fees are paid is retained by the plaintiff, and not paid to the plaintiff's attorney.

"The goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature."[125] If the statutory language is unambiguous, this Court will enforce

[125] *In re Townsend Conservatorship,* 293 Mich App 182, 187; 809 NW2d 424 (2011).

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the statute as written. Statutes are to be read as a whole and courts are to avoid a construction that renders any part of the statute surplusage or nugatory.[126] "Individual words and phrases, while important, should be read in the context of the entire legislative scheme."

In *Phinney v Perlmutter,* 222 Mich App 513, 540–541; 564 NW2d 532 (1997), the Court of Appeals stated that the purpose of prejudgment interest is to compensate the prevailing party for expenses incurred in bringing actions for money damages and for any delay in receiving such damages. The prejudgment interest statute is a remedial statute to be construed liberally in favor of the plaintiff.[127] As such, prejudgment interest can be awarded in cases that involve a "money judgment," which has been defined by courts, using Black's Law Dictionary, as "one which adjudges the payment of a sum of money, as distinguished from one directing an act to be done or property to be restored or transferred."[128]

As an initial proposition, it must be noted the Court of Appeals in this case erroneously held that, "This case does not involve a mere money judgment recovered in a civil action,"[129] even though Michigan courts recognize a money judgment as "one which adjudges the payment of a sum of money, as distinguished from one directing an act to be done or property to be restored or transferred."[130] There can be no dispute that a money judgment was entered in this case. The money judgment directs KEO and

[126] *Mich Props, LLC v Meridian Twp.,* 491 Mich 518, 528; 817 NW2d 548 (2012).
[127] *McKelvie v Auto Club Ins. Ass'n,* 203 Mich App 331, 339; 512 NW2d 74 (1994).
[128] *Moore v Carney,* 84 Mich App 399, 404; 269 NW2d 614 (1978).
[129] *Wyandotte,* p 11.
[130] *Moore,* p 404.

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Westfield to pay a sum of money for the benefit of Wyandotte.[131] The judgment does not direct KEO or Westfield to perform any particular act. The fact that judgment was entered under the payment bond act does not alter the judgment being one for the payment of a sum of money. Therefore, MCL §600.6013(8) is applicable because a money judgment was entered in this case.

The primary error of the trial court was that it applied old law that had been superseded years earlier. *Holland v Earl G Graves Publishing Company, Inc.* 32 F Supp 2d 581 (ED Mich 1998) was the precedent improperly relied upon by the trial court. *Holland* had been overruled by statute in 2001, when the pre-judgment interest statute was amended. In *Holland*, the federal court applied the ruling of *Yaldo*, which had been decided five months earlier in May 1998.

In *Yaldo*, the court was required to construe the old subsection (5), which read:

> "For complaints filed on or after January 1, 1987, *if a judgment is rendered on a written instrument*, interest shall be calculated from the date of filing the complaint to the date of satisfaction of the judgment at the rate of 12% per year compounded annually, unless the instrument has a higher rate of interest. In that case interest shall be calculated at the rate specified in the instrument if the rate was legal at the time the instrument was executed. The rate shall not exceed 13% per year compounded annually after the date judgment is entered." *Yaldo* at 246-247. (Emphasis added).

The *Yaldo* court held that an insurance contract was a "written instrument," and applied the 12% rate to a judgment against the carrier. Justice Taylor, dissenting, gave an exposition on the history of that particular statutory provision, and argued the

[131] App 253a.

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statute was intended only to apply to instruments of indebtedness that carried a specified rate of interest, in order to discourage debtor parties from purposefully defaulting on loans to take advantage of the lower statutory judgment interest rate, which at the time was much lower than market interest rates.

The Legislature reacted. Public Act 175 of 2001 added Section 7 to MCL 600.6013 to narrowly define "written instrument" by adding the modifying phrase, "*evidencing indebtedness with a specified interest rate.*" The Legislature clearly responded to *Yaldo*, enacting HB 4448. The House Legislative Analysis for HB 4448[132] explained the purpose of the new Section 7 of the statute:

> The defendant insurance company in *Yaldo* argued that "written instrument" in this section of the Revised Judicature Act must be defined as a writing that expressly contains a rate of interest, such as a negotiable instrument. The dissenting opinion in *Yaldo* agrees, arguing in part that the legislative history of this section of the RJA shows that "written instrument" was intended to cover only interest bearing instruments. The bill would statutorily affirm the dissenting opinion in *Yaldo*...

The Legislature "statutorily affirmed" the dissenting opinion of *Yaldo*. HB 4448 became effective as PA 175 of 2001 in March of 2002 to create the new subsection (7) to apply only to "written instruments evidencing indebtedness with a specified rate of interest." On appeal in this case, the Court of Appeals did not analyze or even acknowledge the change in statutory language. This failure by the Court of Appeals was clear error. A Court's primary goal is to give effect to the intent of the Legislature,

[132] App 2a.

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and the 2001 amendment reflected the Legislature's change in policy, and its intention to change the result of cases such as *Holland* and *Yaldo*.

> It is well settled by this Court that when an amendment is enacted soon after controversies arise regarding the meaning of the original act, "'it is logical to regard the amendment as a legislative interpretation of the original act...[133]

Furthermore, the Legislature is presumed to be aware of all existing statutes when enacting a new statute.[134] Changes in an act must be construed in light of preceding statutes and historical developments.[135] Accordingly, in light of the controversy that arose regarding the meaning of old section (5), the Legislative intent was to substantially narrow the scope of old Section 5 from "written instrument" to only those written instruments also "evidencing indebtedness." These words must be given meaning, and not rendered nugatory.

The term "evidence(s) of indebtedness" is a common one in Michigan statutes. This phrase is generally employed in conjunction with borrowing money, and public funding bonds (but not payment bonds). There are scores of examples of such use in our statutes.[136] By adding the modifying phrase, "evidencing indebtedness," the Legislature intended to limit the application of old Section 5 only to instruments related to loans and borrowing. Therefore, judgment interest in this case should be controlled by Section 8, and not the old Section 5 or new Section 7.

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[133] *City of Detroit v Walker*, 445 Mich 682, 697; 520 NW2d 135 (1994).
[134] *Walen v Dep't of Corrections,* 443 Mich 240, 248; 505 NW 2d 519 (1993).
[135] *M D Marinich, Inc.*, p 452; 484 NW 2d 738 (1992).
[136] See for example, Constitution of Michigan §31; MCL sections 12.272(d); 41.284; 120.15; 123.11; 207.634; 324.50102; 388.981b(1);

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The Court of Appeals compounded its error when it found that the contract between Wyandotte and ETS qualified under MCL § 600.6013(7) as a "written instrument evidencing indebtedness with a specified rate of interest." That agreement was for the sale of goods *i.e.*, electrical materials that Wyandotte sold to ETS that were incorporated into the Project. Had the Legislature intended a contractual exchange of promises for the sale of goods to come within the scope of old Section 5 or new Section 7, it could have easily done so by using more encompassing words such as written "agreement," or "contract" or similar term, rather than specifically limiting the scope only to those written instruments "evidencing indebtedness." There was no debt at the time the subject contract was entered, so the writing could not have "evidenced indebtedness."

The Court of Appeals believed the "contract" to be comprised of the open account application, project quotation, and purchase orders[137] and that Wyandotte "recovered from the [payment] bond *based* on the contract between Wyandotte and ETS."[138]

The Court of Appeals described the sale of goods contract between Wyandotte and ETS as, "actually comprised of various documents. It includes the original open account application with accompanying terms, the project quotation, and the purchase orders under the quotation. The contract evidences a debt, the accumulated balance of payments due under the purchase orders."[139] The Court of Appeals acknowledged that

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[137] *id.*
[138] *Wyandotte,* p 11 (emphasis added).
[139] *Wyandotte,* p 11

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there is no single "written instrument" in this case. There is no single integrated document between them.

Instead, the "contract" or agreement between Wyandotte and ETS is comprised of ETS's 2003 credit application for an open account with Wyandotte, Wyandotte's 2009 quotation to ETS, and Wyandotte's 2010 invoices to ETS. MCL § 600.6013(7), however, implies a formal integration – a *single* "written instrument evidencing indebtedness" – rather than, as in this case, a series of documents spread over seven years. The statute does *not* say: "one or more documents, together constituting a contract, evidencing indebtedness."

Indeed, there was no debt to evidence at the time of contract. Again, the Court of Appeals, without any analysis, wrongfully held that, "The contract evidences a debt, the accumulated balance of payments due under the purchase orders."[140] To the contrary, there was no debt to evidence at the time of the 2003 credit application, nor at the time of the 2009 quotation. The 2003 credit application was merely an agreement for the sale of goods on credit terms between the contracting parties. Future account balances were contemplated between them, for sure, but Wyandotte did not loan any money to ETS. The purpose of the credit application, quotation and purchase order was to supply electrical materials. Their agreement was *not* to document a debt. The credit application does not evidence any indebtedness on its face.

[140] *Wyandotte*, p 11

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While the term "written instrument" has been treated as encompassing more than a "negotiable instrument," it should not be equated to a series of documents that are not integrated. In *Yaldo*, the Court of Appeals looked to Black's Law Dictionary in defining a "written instrument" as "something reduced to writing *** as the means of giving formal expression to some act or contract." On that basis, the Court of Appeals determined that an insurance policy was a "written instrument" under the statute. Since that decision, other panels of the Court of Appeals have referenced that decision.[141]

Specifically, in another construction litigation case, the parties disagreed over which section of MCL § 600.6013 applied.[142] Contrary to the Court of Appeals panel in the present case, in that case the Court of Appeals determined that plaintiff's sworn statements and invoices, while establishing contractual agreement, did not meet the definition of "written instrument" under the statute:

> The parties further disagree on whether judgment interest is available under MCL 600.6013(5), or (6) and (8). MCL 600.6013(5) allows a party to recover interest at a higher rate than that typically allowed by MCL 600.6013(8), if the claim is based on a written instrument. Here, plaintiff has not established the existence of a "written instrument" within the meaning of the statute. In general, the term "written instrument" is interchangeable with the term "written contract." *Yaldo v. North Pointe Ins Co*, 457 Mich. 341, 346; 578 NW2d 274 (1998). In the trial court, plaintiff relied on copies of its sworn statements and construction liens filed against the subject property, and copies of its invoices to establish a written instrument. Although the parties may have had a contractual arrangement, these

[141] See, e.g., *Regents of the Univ of Mich v State Farm Mut Ins Co*, 250 Mich App 719; 650 NW2d 129 (2002) holding that a no-fault insurance plan and a health care plan governed by ERISA were "written instruments".

[142] *Lawrence M. Clark Inc v SMRT, LLC*, unpublished opinion per curiam of the Court of Appeals, decided May 3, 2005 (Docket No. 250671) (App 8a).

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> documents do not satisfy the definition of a 'written instrument.'

The Court of Appeals in *Lawrence M. Clarke, Inc.,* correctly interpreted the statute at issue. The Supreme Court should adopt this reasoning to clarify and limit the term "written instrument" in MCL § 600.6013(7) to one document.

The Court of Appeals in this case erred because judgment under the bond act should have been entered, if at all, under the statute and bond, not the Wyandotte-ETS contract. Judgment was not and could not have been entered against KEO and Westfield based on the contract between Wyandotte and ETS. Neither KEO nor Westfield were parties to the sale of goods contract and they assumed no contractual obligations thereunder merely of their participation in a public works project.

The payment bond is the only basis for liability against KEO and Westfield, and the payment bond does not evidence any indebtedness and contains no rate of interest.[143] Thus, on Wyandotte's money judgment against KEO and Westfield, statutory interest calculated at 6 month intervals under MCL 600.6018(8) should apply. Wyandotte's sale of goods contract with ETS does not evidence indebtedness with a specified rate for purposes of MCL § 600.6013(7), and neither does the payment bond.

Furthermore, it is very difficult to reconcile the Court of Appeals' decision to force KEO and Westfield to pay time price differential under the inappropriate "project enhancement" theory of *Price Bros.,* yet alternatively, classify the credit application charge as a "rate of interest" for purposes of MCL §600.6013(7). *Price Bros.*

[143] App 52a.

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characterized the time price differential as a "flexible price factor."[144] This Court should not endorse the so-called "flexible price" under *Price Bros.* in any respect, much less to allow the price factor to also be considered a rate of interest under MCL § 600.6013(7). It cannot be both.

The Court of Appeals erred when it affirmed the judgment against KEO and Wyandotte with post-judgment interest to accrue pursuant to MCL § 600.6013(7). This Court should reverse.

RELIEF REQUESTED

Defendants – Appellants KEO & Associates, Inc. and Westfield Insurance Company requests that this Court:

A. Enter an order reversing the Court of Appeals' decision and reversing the trial court's grant of summary disposition under MCR 2.116(C)(10) in favor of Plaintiff – Appellee Wyandotte Electric Supply Company, and direct the trial court to enter judgment to dismiss the lawsuit in favor of Appellants Westfield Insurance Company and KEO & Associates, Inc.

B. Enter an order reversing the Court of Appeals' decision and reversing the trial court's grant of summary disposition holding Defendant – Appellants KEO and Westfield liable for time-price charges and attorney fees that neither agreed to pay and that are not expressly provided by statute;

C. Enter an order reversing the Court of Appeals' decision and reversing the trial court's ruling that MCL § 600.6013(7) applies to the money judgment that arose from a contract other than a written instrument evidencing indebtedness with a specified rate.

[144] *Price Bros.*, p 377

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Dated: March 31, 2015

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